Office - Supreme Court, U.S.
FILED
FEB 9 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 612

MILTON H. OLENDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

LEO R. FRIEDMAN,
De Young Building, 690 Market Street,
San Francisco 4, California,
Attorney for Petitioner.

PRIEST-WALKE PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Authorities Cited

Cases	Pages
Berra v. United States, 351 U.S. 131, 76 S.Ct. 685	4
Cheyne v. A.T. & S.F. Ry. Co., 125 F. 2d 49	5
Electro Therapy Corp. v. Strong, 84 F. 2d 766	5
Moran v. United States, 236 F. 2d 361	4
Southern Pacific Co. v. McAdoo, 82 F. 2d 121	5

Statutes

Internal Revenue Code of 1939:
- Section 145(b) [26 U.S.C. 145(b)] 2
- Section 3616a 3, 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 612

MILTON H. OLENDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner requests a rehearing of the order of this Court made on January 21, 1957, denying his petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction for the evasion of income taxes due for the years 1945 and 1946, on the grounds that since the filing of the original petition herein intervening cir-

cumstances have arisen of substantial and controlling effect and of a substantial nature now but not heretofore available to petitioner, to-wit:

1. On January 28, 1957, this Court, in the certiorari proceeding of *Costello v. United States,* (No. 666, October Term, 1956) granted certiorari to determine the issue of whether one indicted and sentenced for filing a false and fraudulent return under sec. 145b of the Internal Revenue Code of 1939 and sentenced to more than one year imprisonment and to pay a fine of more than $1,000, was not sentenced under the wrong statute but should have been sentenced under sec. 3616a of said code, which provides for a maximum sentence of not more than one year and a fine of not more than $1,000. The same question is here involved as in the *Costello* case, all as hereinafter set forth.

2. That respondent's brief in opposition to the petition as filed herein contains erroneous computations and conclusions, all of which may have and probably did influence this Court in denying the petition.

1.

Petitioner was indicted for alleged violations of sec. 145(b) of the Internal Revenue Code of 1939 [26 U.S.C. 145(b)] for the years 1945 and 1946. The charging parts of each of the four counts of the indictment (save as to dates and amounts) reads the same. We quote from Count One of the indictment (italics added):

> "That on or about the 15th day of March, 1946, in the Northern District of California, Milton H. Olender, late of Oakland, California, did wilfully and know-

ingly *attempt to defeat and evade* a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, *by filing and causing to be filed with the Collector of Internal Revenue* for the First Internal Revenue Collection District of California, at San Francisco, California, *a false and fraudulent income tax return* wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of $21,096.38, and that the amount of tax due and owing thereon was the sum of $7,931.86, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $21,096.38, and that the amount of tax due and owing thereon was the sum of $7,931.86, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $34,553.69, and upon which said net income he owed the United States of America an income tax of $16,478.92." (R. 3-4.)

Petitioner was convicted on all four counts and sentence and judgment pronounced as follows:

"Count 1—Three (3) years and pay a fine of Ten Thousand Dollars ($10,000);

Count 2—Three (3) years;

Count 3—Three (3) years and pay a fine of Ten Thousand ($10,000);

Count 4—Three (3) years.

Ordered that said terms of imprisonment run concurrently." (R. 9.)

Section 3616a of the Internal Revenue Code of 1939 reads as follows:

> "Whenever any person—(a) Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, * * *"

It is manifest that each count of the indictment charges a violation of the foregoing sec. 3616a. (Cf. *Berra v. United States,* 351 U.S. 131, 76 S.Ct. 685.)

As the maximum penalty that could be imposed under said sec. 3616a was one year imprisonment and a fine not exceeding $1,000, the trial court was without jurisdiction to impose the above penalties under sec. 145(b) of the code.

For the reasons that this Court granted the writ of certiorari in the *Costello* case, it should grant a rehearing herein and order the writ to issue.

The reasons why this question was not presented in the petition for the writ herein are as follows:

Following the decision of this Court in *Berra v. United States, supra,* several District Courts and Courts of Appeal rendered decisions to the effect that the Government could proceed under either of the code sections involved; among these decisions was that of *Moran v. United States,* 236 F.2d 361, where the issue was directly raised. Moran petitioned this Court for certiorari to review such ruling and this Court denied certiorari on Nov. 13, 1956, less than a month before the filing of the petition herein. In view of such action by this Court petitioner believed that

it would be futile to again raise the point herein; but, since the granting of the writ in the *Costello* case, this Court now considers the matter to be of sufficient importance to warrant a direct decision on the question.

It is our understanding that the question of jurisdiction can be raised at any time, even after trial and on appeal. (*Southern Pacific Co. v. McAdoo,* 82 F. 2d 121; *Electro Therapy Corp. v. Strong,* 84 F. 2d 766; *Cheyne v. A.T. & S.F. Ry. Co.,* 125 F. 2d 49.)

2.

The case for the prosecution was based on the net worth method of proof, based on the charges that petitioner attempted to evade the payment of income taxes for 1945 and 1946 by filing false and fraudulent income tax returns for such years.

The prosecution contended that there was an understatement of income for the year 1945 amounting to $46,931.63, based on cash on hand at the end of 1944 in the sum of $50,000 and $7,200 at the end of 1945.

In the respondent's brief in opposition filed herein, footnote 3 on page 7, it is admitted that under the Court's instructions the jury had to credit petitioner with $70,300 at the end of 1944 and that "Under the court's instructions, therefore, the jury was obliged to adjust the unreported income downward by the difference, $27,500." This reduces the unreported income to $19,431.63, and eliminates any cash on hand at the end of 1945. This figure includes $82,000 worth of bonds at the end of 1945, of which petitioner claimed there was $20,000 worth belonging to his mother.

If petitioner's contention is sound, then it wipes out any claimed unreported income for the year 1945.

The full substance of the evidence relied on to establish that these bonds belonged to Olender's mother is set forth in the petition herein from pages 13 to 21, and summarized is as follows:

On Dec. 5, 1945, Olender purchased with cashier check, purchased with cash, $25,000 worth of bonds (R. 451-2). On Nov. 23, 1945 Olender's mother wrote him that if he had no further use for the cash in the box to put it in Government bonds (R. 563); on Dec. 14, 1945, Olender's mother wrote him acknowledging the purchase of the bonds for her (R. 565); Olender purchased $25,000 in bonds, $20,000 thereof for his mother and put them in the safe deposit with the numbers of the bonds and his mother's name on the envelope (R. 566); in August of 1946 the Internal Revenue Department demanded that Olender explain the transaction of Dec. 5, 1945, involving the expenditure of the $25,000 (R. 559, 560); Olender answered stating that $20,000 thereof was the purchase of bonds for his mother with her money, etc., (R. 560-562); in May of 1948 the accountant Ringo made an inventory of the contents of the safe deposit box (R. 169) and found therein, in a bundle or envelope, the same bonds, listing them by number and amount, with some writing on the container showing that they were the property of Olender's mother (R. 229, 230 and 202-3); on July 13, 1953, the bonds were sold for the Estate of Mollie Olender (the mother who had since died) and a check therefor issued by the bank conducting the sale to Mollie Olender's Estate (R. 518, 520); that the check was deposited in Mollie

Olender's Estate. The net worth statement submitted by Olender to the Government in September 1948 (Introduced by the Government as U.S. Exhibit 10, R. 109, 233) lists $20,000 of the bonds on hand at the end of 1945 as belonging to Olender's mother.

Respondent argues against the foregoing unbroken line of evidence as follows (Br. in Opp. p. 10):

> "Petitioner rented a safe deposit box jointly with his mother and another jointly with his wife. The bonds were kept in the latter. (R. 222-223, 731.) They were in petitioner's possession from the time of purchase until the time of sale. (R. 565). He clipped the interest coupons and reported the interest earned in his 1947 individual income tax return. (R. 223-224, 569, 736, 744.) * * * The bonds were not reported on the mother's estate tax return filed by petitioner's sister, who was co-executor with him of the mother's estate. (R. 487-491, 740-742.) After petitioner's first trial he filed a 'supplemental inventory and appraisement' on behalf of the estate (on March 30, 1953) reporting the bonds as the mother's property for the first time. (R. 740-741) Treasury agents made an intensive examination of the banking transactions of petitioner's mother in an effort to learn whether she might have furnished the money for the bonds, but were unable to find transfers of funds or withdrawals of cash sufficient to account for them. (R. 483-484.)"

Respondent argues that the foregoing created a conflict in the evidence which the jury decided against petitioner.

Mere suspicion, surmise and conjecture do not create any conflict in the evidence; and that is all that the evidence amounts to relied on by respondent.

Irrespective as to which safe deposit box the bonds were kept in, Ringo, the prosecution's witness, testified that in early 1948 they were all earmarked as the mother's. Petitioner was not bound by nor responsible for any return made individually by petitioner's sister. However, this return has noted in pencil thereon "U.S. Government Bonds 20m", and contains the statement by petitioner's sister: "If there were any other transfers made" she had no record or knowledge thereof. (R. 490.)

As to the filing of the "supplemental inventory and appraisement" by petitioner after the first trial, this can have no probative effect. The first trial was in September, 1952; petitioner was convicted and appealed, the conviction was reversed by the Court of Appeals on Feb. 15, 1954, almost a year after the filing of the supplementary inventory. Clearly, the filing thereof after his conviction could not have been prompted by any ulterior motive.

Relative to the investigation by the revenue agents (R. 483-484) this shows that they only examined Mrs. Olender's accounts in the Fresno banks. Defendant's Ex. "P" shows that she had another account in an Oakland bank which had therein $8,000 at the time of her death and the letter she wrote to Olender on July 11, 1944 (R. 647) states that she kept cash on hand.

Thus, the unbroken line of evidence relative to these bonds, some of which was introduced by the Government, establishes that the $20,000 worth of bonds were petitioner's mother's and must be deducted from his net worth at the end of 1945, wiping out any claimed understatement of income. The evidence relied on by respondent does not refute this or create any conflict in the record.

Based upon the foregoing the case does not fall within the rule that where one is convicted on several counts, some of which are not supported by the evidence, the case will not be reversed if the judgment does not exceed what could have been pronounced under one good count of the indictment. Here there is no such situation.

It is respectfully submitted that the order denying the writ should be reversed, a rehearing granted and the writ should issue as prayed for in order that justice be done in the premises.

Dated, San Francisco, California,
February 6, 1957.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

Leo R. Friedman hereby certifies that he is a member of the Bar of the Supreme Court of the United States; that the foregoing Petition for a Rehearing is presented in good faith and not for delay; that the petition is restricted to the grounds set forth in Rule 58 of the Supreme Court.

Dated, San Francisco, California,
February 6, 1957.

LEO R. FRIEDMAN.